(6)

No. 93-1677

In the
Supreme Court of the United States
October Term, 1994

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,
Petitioner,

v.

JEFFERSON LINES, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF ON THE MERITS FOR THE RESPONDENT JEFFERSON LINES, INC.

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76 pp

QUESTION PRESENTED

Does the sales tax imposed by Oklahoma Statutes Title 68, Section 1354(1)(C) exact an unfair portion of the proceeds of interstate commerce by levying a tax on the entire gross receipts of transportation for hire without regard to the fact that a substantial portion of such transportation is furnished outside Oklahoma?

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On Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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JEFFERSON LINES, INC.

OPINIONS BELOW

The opinions below are adequately set forth in the Brief for the Petitioner ("Petitioner's Brief") and are appended to the Petitioner's Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioner's Brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . .

* * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Pertinent sections of the Oklahoma Sales Tax Statutes ("Taxing Statute") are as follows:

OKLA. STAT. tit. 68, § 1354(1)(C) (Supp. 1988):

There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of

four percent (4%) of the gross receipts or gross proceeds of each sale of the following:

* * * *

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire . . .[1]

OKLA. STAT. tit. 68, § 1352(F) (Supp. 1988) defines "gross receipts" or "gross proceeds" as "the total amount of consideration for the sale of any tangible personal property or service taxable under this article, whether the consideration is in money or otherwise . . ."

OKLA. STAT. tit. 68, § 1352(L)(4) (Supp. 1989) provides that, for purposes of Chapter 68:

> 'Sale' means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this subsection, including but not limited to:
>
> * * * *
>
> (4) The furnishing or rendering of services taxable under this article.
>
> * * * *

[1] The Taxing Statute does not provide a credit against the sales tax for taxes paid to other states with respect to such transportation for hire.

STATEMENT OF CASE

Respondent Jefferson Lines, Inc. ("Jefferson")[2] was a common carrier providing bus services in Oklahoma as well as numerous other states. In its operation in Oklahoma, Jefferson undertook to furnish both "intrastate" and "interstate" transportation services. "Intrastate transportation" relates to routes which both originate and terminate solely within the State of Oklahoma without crossing any state lines. Conversely, "interstate transportation" relates to: (1) routes which originate in Oklahoma and terminate in a state other than Oklahoma and vice-versa; (2) routes which originate and terminate in Oklahoma but involve travel outside of the State of Oklahoma (i.e. "roundtrip tickets"); and (3) routes which are paid for in the State of Oklahoma for travel that neither originates nor terminates in Oklahoma but necessarily crosses at least one state line.

On October 27, 1989, Jefferson filed its Petition for Voluntary Chapter 11 Bankruptcy with the United States Bankruptcy Court, District of Minnesota. On August 3, 1990, Jefferson's Plan of Reorganization was confirmed. In conjunction with Jefferson's Chapter 11 bankruptcy, the Commission filed various proofs of claim which alleged an obligation for the collection and remittance of certain sales tax in Oklahoma. The Commission claimed that Jefferson should have collected and remitted sales tax on the gross receipts of all sales of bus transportation if the tickets were bought within Oklahoma, whether or not the routes involved substantial

[2] There are no parent companies or subsidiaries which are required to be listed pursuant to Rule 29 of the Rules of the Supreme Court of the United States.

interstate transportation. Jefferson objected to the Commission's proofs of claim.

By Order dated May 13, 1992, the United States Bankruptcy Court, District of Minnesota, sustained Jefferson's objection holding that the Oklahoma sales tax in regard to interstate transportation furnished by Jefferson is not fairly apportioned and discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. The Commission appealed. By Order dated December 22, 1992, the United States District Court, District of Minnesota, affirmed the Bankruptcy Court. The District Court reasoned that the Oklahoma sales tax as applied to such interstate transportation establishes a strong potential for multiple taxation and is not reasonably apportioned. The Commission appealed. On January 21, 1994, the Eighth Circuit, in a decision authored by Chief Judge Richard S. Arnold, affirmed the District Court, reasoning that Oklahoma was attempting in this instance to tax gross receipts from the sale of transportation outside its borders by taxing more than the instate component of the interstate activity in violation of the Commerce Clause of the United States Constitution. *See In re Jefferson Lines, Inc.*, 15 F.3d 90 (8th Cir. 1994).

SUMMARY OF ARGUMENT

As developed below, Oklahoma is seeking in this instance to tax interstate transportation for hire. Therefore, the question before this Court, as it determines the validity of the Commission's claims, is whether in regard to furnishing interstate transportation for hire, the Taxing Statute and the Commission's application of the Taxing Statute violate Article I, Section 8, Clause 3, of the United States Constitution ("Commerce Clause"). After thoughtful and well reasoned

analyses, including the application of the Court's prior decisions, the Bankruptcy Court, the District Court and the Eighth Circuit Court of Appeals have concluded that Oklahoma Statutes Title 68, § 1354(1)(C) imposes a sales tax on interstate transportation for hire, measured by gross receipts therefrom, which is not fairly apportioned or which discriminates against interstate commerce in violation of the Commerce Clause. This Court's decision in *Central Greyhound Lines v. Mealy* mandates invalidation of the Taxing Statute as it relates to interstate bus transportation. Furthermore, the Commission's assertions regarding the taxable activity are contrary to the express language of the Taxing Statute and to this Court's previous decisions involving sales taxes under the Commerce Clause. Finally, the Taxing Statute and the Commission's application thereof fail to meet the test formulated in *Complete Auto Transit Co. v. Brady*. The opinions of the lower courts rest on Commerce Clause decisions reached by this Court. Accordingly, Jefferson respectfully requests this Court to affirm the decision of the Eighth Circuit Court of Appeals.

ARGUMENT

A. *CENTRAL GREYHOUND* MANDATES THAT A TAX ON THE ENTIRE GROSS RECEIPTS OF INTERSTATE BUS TRANSPORTATION BE DECLARED INVALID UNDER THE COMMERCE CLAUSE.

This Court has previously addressed the Commerce Clause validity of a tax imposed on the gross receipts from interstate bus transportation. *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948). In *Central Greyhound*, this Court invalidated New York's unapportioned tax on the gross receipts from interstate transportation which to a substantial

extent took place outside the taxing state on the basis such transportation could not be deemed legally to take place solely in New York. *Id.* at 660. The Commission's attempt to impose a sales tax on the entire gross receipts of interstate transportation which is furnished outside of Oklahoma is contrary to this Court's decision in *Central Greyhound*, which requires that an unapportioned gross receipts tax on interstate bus transportation be declared invalid. *Id.* The Taxing Statute is indistinguishable from the tax previously held unconstitutional by this Court in *Central Greyhound*. *See* Respondent's Brief pp. 27-28. The fact that *Central Greyhound* was decided prior to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) is irrelevant. As demonstrated below, this Court recently endorsed *Central Greyhound* as consistent with *Complete Auto*. This Court recognizes that *stare decisis* has "special force" where, as in this case, "Congress remains free to alter what we have done." *Quill Corp. v. North Dakota*, 504 U.S. ___, 112 S.Ct. 1904, 119 L.Ed.2d 91, 111-112 (1992) (Scalia, J., concurring) citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Jefferson maintains that the demands of *stare decisis* are especially important when considering the reliance interests involved in the realm of commercial activity. Thus, on *stare decisis* grounds alone the Eighth Circuit opinion should be affirmed.

B. OKLAHOMA STATUTES TITLE 68, SECTION 1354(1)(C), AS IT APPLIES TO INTERSTATE TRANSPORTATION FOR HIRE, IS A TAX ON INTERSTATE COMMERCE THAT MUST WITHSTAND SCRUTINY UNDER THE COMMERCE CLAUSE.

1. Interstate Bus Travel Constitutes Interstate Commerce.

The term "interstate commerce" means "commerce between any place in a State and any place in another State, or between places in the same State through another State. . . ." *Central Greyhound*, 334 U.S. at 661. "It is too late in the day to deny" that transportation which leaves a State to enter another State is "Commerce among the several States." *Id.* at 655-56. The Commission hinges its position on the assertion that the Taxing Statute is imposed on a discrete local activity -- the sale of a bus ticket. In so doing, the Commission seeks to "indulge in pure fiction" by characterizing the tax in this case as one on a "discrete local activity," namely the sale of an interstate bus ticket, rather than a sales tax imposed on transportation services that Jefferson renders outside Oklahoma. *Id.* at 660. This Commission's contortion of the taxable event is contrary to the express language of the Taxing Statute. Even if the Taxing Statute did apply to the sale of a bus ticket, however, such a transaction, when it relates to transportation services that are rendered outside of the taxing state, necessarily triggers activity in other states. *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). The sales tax in this instance is imposed on interstate commerce whether, as the Taxing Statute plainly requires, the taxable event is viewed as the furnishing or rendering of interstate transportation services or, without

regard to such plain requirement, it is characterized to be the sale of a bus ticket for such transportation services.

2. The Commission's Attempt To Characterize The Tax As One On The Sale Of A Bus Ticket Is Contrary To The Taxing Statute.

The relevant provision before the Court is Section 1354(1)(C) of the Taxing Statute, which imposes a sales tax of 4% of the "gross receipts" of each "sale" of "transportation for hire."[3] "Gross receipts" is defined at Section 1352(F) of the Taxing Statute to mean the total amount of consideration for the sale of any tangible personal property or service taxable under this article. Thus, the sales tax applies to either the "sale" of tangible personal property or the "sale" of certain enumerated services, including "transportation for hire." Section 1352(L)(4) provides that a "sale" with respect to services means "the furnishing or rendering of services." Accordingly, with respect to the sale of transportation for hire, the Taxing Statute, at Section 1354(1)(C), literally imposes a sales tax of 4% of the gross receipts from the furnishing or

[3] The tax was collected by Oklahoma under Section 1354(1)(C). The lower court decisions determined the relevant statutory provision to be Section 1354(1)(C). Oklahoma has stipulated that Section 1354(1)(C) is the applicable provision, and the Amicus Brief in Support of Petitioner recognizes it as the relevant provision and concedes that transportation for hire is a service for purposes of Oklahoma's sales tax statute. The Commission's unexplained reference to Section 1354(1)(A) in its Brief has no apparent bearing in this case which is concerned solely with transportation for hire. Because the tax imposed under Section 1354(1)(C) is on the **entire gross receipts** of interstate transportation for hire, it is incapable of being apportioned with respect to such transportation, and the Commission's attempt to collect sales tax thereunder must be disallowed in toto.

rendering [the "sale"] of transportation services. The taxable event is therefore not the sale of the ticket for such transportation services as the Commission claims.[4]

State and federal courts that have interpreted the relevant provisions of the Oklahoma Sales Tax Statutes have concluded that with respect to the sale of services, the activity being taxed thereunder is the furnishing or rendering of the services, not payment therefor or the execution of an agreement to acquire such services. *Tad Screen Advertising, Inc. v. Oklahoma Tax Commission*, 126 F.2d 544 (10th Cir. 1942) (adopted by the Oklahoma Supreme Court in *Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8, 10-11 (Okla. 1976)); *Pioneer Telephone Cooperative Inc. v. Oklahoma Tax Commission* 832 P.2d 848, 851 (Okla. 1992).

Given the express language of the Taxing Statute, the tax in question may not be properly characterized as a tax on the "sale of" transportation services if that locution means anything more than the "furnishing or rendering of" such services -- it cannot mean the sale of a bus ticket. A tax characterized by the Commission as one on the sale of a bus ticket that is statutorily measured by the gross receipts from the furnishing

[4] Neither the Taxing Statute nor the Commission's own regulation regarding transportation for hire refers to the transaction of "purchasing (or selling) a ticket" for transportation services. Oklahoma Administrative Code 710:65-19-328, Transportation for hire (Reserved at 10 Ok. Reg. 1111, eff. 2-23-93 (emergency); Added at 10 Ok. Reg. 3847, eff. 7-12-93). This regulation acknowledges the "service" nature of transportation for hire in providing exemptions "if transportation services are provided by a tourism service broker or, if the transportation services are provided by funeral establishments for purposes of conducting a funeral." *Id.*

or rendering of transportation services is a tax on the furnishing or rendering of transportation services.[5]

3. Under The Taxing Statute And The Commerce Clause, It Is The Furnishing Or Rendering Of The Services That Justifies Imposition Of A Sales Tax On Services.

The Oklahoma Supreme Court has held that for purposes of the Oklahoma sales tax statute, "[t]o be taxable in Oklahoma the sale must be made in Oklahoma." *Liberty Steel*, 554 P.2d 8, 10 (Okla. 1976). In the case of tangible personal property, Section 1352(L) provides that the transfer of title or possession requisite to a "sale" of the property must be in Oklahoma. OKLA. STAT. tit. 68, § 1352(L). In the case of services, Section 1352(L) defines a "sale" to mean ". . . other transactions as provided by this subsection, including but not limited to . . . (4), the furnishing or rendering of services taxable under this article." OKLA. STAT. tit. 68 § 1352(L)(4). On its face, the statute does not expressly state where such activities, in this case the provision of transportation for hire,

[5] The Commission's claim here seeks to dissociate the sale of the ticket from the furnishing of services, while acknowledging that the measure of the tax is the gross receipts from such services. But "[a] tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 374 (1991) (quoting Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239, 242 (1960)). Similarly, Oklahoma cannot assert that the tax on transportation for hire is really a tax on the sale of a bus ticket unless the tax is imposed **because of** the bus ticket. (*Jenkins* at 242.) It is a truism "that a tax on A is not a tax on B unless it is because of B." . . . "[A] tax on eating is not a tax on butter, even though you happen to be eating butter. Of course, if the tax on eating is levied only because you eat butter, then it is a tax on butter." *Id.*

must take place in order for the sale of the services to be "made" within Oklahoma. *Id.*

However, a sales tax that is imposed on transportation services furnished or rendered outside the taxing state is not a tax on a discrete local activity, and necessarily implicates Commerce Clause scrutiny. *Central Greyhound*, 334 U.S. 653 (gross receipts tax imposed on interstate transportation services); *Tad Screen Advertising*, 126 F.2d 544 (upholding prior version of Oklahoma sales tax statute imposed on advertising services performed within Oklahoma on the grounds that the taxable event was the furnishing of primary services within Oklahoma); *Ragland v. Allen Transformer Co.*, 740 S.W.2d 133 (Ark. 1987), cert. denied, 486 U.S. 1007 (1988); *Corning Laboratories, Inc. v. Iowa State Dept. of Revenue*, 270 N.W.2d 463 (Iowa 1978); *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531 (Tenn. 1985)[6].

In *Tad Screen Advertising*, the court upheld the imposition of Oklahoma's sales tax on the sale of advertising services under the Commerce Clause. 126 F.2d 544. The contract for the purchase of the services was made in Texas.[7]

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[6] We address herein only the constitutional question of whether the tax attempted to be imposed on Jefferson by the State of Oklahoma violates the Commerce Clause. Of course, if the furnishing or rendering of services outside of Oklahoma is not a "sale" of services within the meaning of the Taxing Statute the sales tax could not be imposed on such transportation services under the internal laws of the State.

[7] Although negotiations, countersignatures and various approvals typically involved activities in several states, the contracts were approved and countersigned by the taxpayer in Texas. *Tad Screen Advertising*, 126 F.2d at 546. Where such negotiations, approvals and signings occur is irrelevant for Commerce Clause purposes. It also appears, at least in the

The taxpayer rendered other services outside of Oklahoma in addition to advertising services within Oklahoma. *Id.* at 548-549. However, the court found such outstate services to be incidental, and held that Oklahoma's sales tax on the furnishing or rendering of advertising services did not violate the Commerce Clause because the "taxable event" for Commerce Clause purposes (the relevant local event) was the furnishing of the primary services in Oklahoma. *Id.* at 548. These were the services that constituted the "object" of the contract. *Id.*

Several state courts have addressed the issues raised under the Commerce Clause by the imposition of sales taxes on the sale of services. Each of these decisions is consistent with *Tad Screen Advertising*. In *Ragland v. Allen Transformer Co.*, the Arkansas Supreme Court held that the "taxable event" under Arkansas' sales tax on services was "the rendering of services within the state," and upheld the tax imposed on repair services rendered in Arkansas on goods shipped to outstate customers. 740 S.W.2d 133 (Ark. 1987), cert. denied, 486 U.S. 1007 (1988). In *LeTourneau Sales & Service*, the Tennessee Supreme Court upheld the Tennessee sales tax on repair services performed entirely within Tennessee relating to goods shipped outstate, because the "taxable event" was the rendering of services within Tennessee. 691 S.W.2d at 536. In *Corning Laboratories, Inc.*, the Iowa Supreme Court upheld the Iowa sales tax imposed on testing services performed in Iowa, stating

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case of the sale of tangible personal property, to be irrelevant under the Taxing Statute. *See* OKLA. STAT. tit. 68 § 1352(L)(4) ("regardless of the manner, method, instrumentality or device by which the transfer is accomplished."). The Commission has also recognized this, at least with respect to the sale of tangible personal property, in its regulations. Administrative Rules of the Oklahoma Tax Commission March 10, 1989, Rule 13.011.01:B.3, Interstate Commerce (place at which contract is negotiated and executed is immaterial).

"[t]here is no other state which has any relation, however remote, to those services." 270 N.W.2d at 465. Similar decisions were reached in *Fisher-Stevens, Inc. v. Director, Div. of Taxation*, 121 N.J. Super. 513, 298 A.2d 77 (App. Div. 1972) (New Jersey sales tax imposed on advertising services); *Airwork Serv. Div. v. Director*, 2 N.J. Tax 329, *aff'd*, 4 N.J. Tax 532 (1982), *aff'd*, 97 N.J. 290, 478 A.2d 729, *cert. denied*, 471 U.S. 1127 (1985) (New Jersey sales tax imposed on airplane repair services). Although the *Airwork* court was not specifically applying its Commerce Clause analysis, it stated that "[w]hen the performance of an activity is subjected to a sales tax, the place of performance determines the place of taxation." 2 N.J. Tax at 345. The holdings in these cases relate to the validity of sales taxes under the Commerce Clause, and cannot be regarded simply as statutory interpretations determining the location of the sale within the meaning of the given taxing statute.

These state court decisions all (with the exception of the New Jersey decisions) cite and rely on this Court's decisions in *Evco v. Jones*, 409 U.S. 91 (1972) and *Dept. of Treasury v. Ingram-Richardson Mfg. Co. of Indiana, Inc.*, 313 U.S. 252 (1941), addressing the Commerce Clause implications of two separate gross receipts taxes imposed on the sales of goods or services.

In *Ingram-Richardson*, the Court upheld an Indiana gross income (receipts) tax imposed on enameling services performed entirely within Indiana. *Ingram-Richardson*, 313 U.S. 252. The Court agreed with the lower court that the receipts in question were derived from the sale of services rather than from the sale of goods. *Id.* at 254. The Court held that "[t]he fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside

Indiana did not make the enameling process other than an intrastate activity and any the less a proper subject for the application of the taxing statute." *Id.* The performance of services, not the execution of the agreement regarding the services, was the relevant intrastate activity for purposes of the Commerce Clause analysis. *Id.*

In *Evco*, the Court considered a New Mexico gross receipts tax imposed on total proceeds received from the sale of "reproducible originals" of books, films, and magnetic audio tapes. *Evco*, 409 U.S. at 91. The reproducible originals were created in New Mexico. *Id.* The contracts relating to the purchase of the reproducible originals were negotiated and executed outside New Mexico, and the reproducible originals were delivered outside New Mexico to the taxpayer's customers. *Id.* The *Evco* Court cited its decision in *Ingram-Richardson Mfg. Co.* as authority for the proposition that "a State may tax the proceeds from services performed in the taxing State, even though they are sold to purchasers in another state", finding irrelevant the fact that the sales were made to out-of-state customers. *Evco*, 409 U.S. at 93. However, the *Evco* Court accepted the lower court's finding that the sales in question were of tangible personal property, rather than of services, because "the reproducible originals [not the performance of the services] were the *sine qua non* of the contract." *Id.* at 94 (Emphasis Added). The Court then held the New Mexico tax invalid because it was imposed on tangible personal property sold (*i.e.* delivered) outside of New Mexico. *Id.*

Ingram-Richardson and *Evco v. Jones* are consistent with a long line of decisions reached by this Court that focus (as did the Court of Appeals hereinbelow) on the **practical effect** of a sales or gross receipts tax for Commerce Clause purposes.

But *Ingram-Richardson* and *Evco v. Jones* are significant for two other reasons. First, they establish that the Court will look to what the purchaser and seller of goods or services regard as the thing being purchased (the *sine qua non*) in determining the proper subject of the tax. Second, they establish that in the case of the sale of services, the proper subject of the tax for purposes of the Commerce Clause is the furnishing or rendering of such services.[8]

Evco, Ingram-Richardson, Tad Screen Advertising, and the state court decisions discussed above make clear that, for Commerce Clause purposes, the local activity to which a sales tax on services must relate is the furnishing or rendering of those services, not the execution of an agreement to purchase (or payment for) said services. Under the Commerce Clause, the treatment of a sales tax imposed on services is thus parallel to this Court's treatment of a sales tax imposed on the sale of goods. In the latter case, the delivery of the goods, not the execution of the purchase agreement nor the payment, is the relevant local activity, to determine the proper subject of the tax. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) (upheld New York sales tax imposed on sale of goods delivered within the state; delivery was the local activity justifying imposition of the tax; Court did not address the two instances where the delivery was made outside of the taxing state); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (invalidated Arkansas sales tax imposed on goods delivered to common carrier outside of Arkansas because "the sale - the transfer of ownership - was made in Tennessee"). *Evco v. Jones, Ingram-Richardson*, and cases cited by the Commission

[8] *See Tad Screen Advertising*, discussed above, where the court recognized that the rendering of advertising services was the "object" sought by the purchaser.

such as *Itel Containers v. Huddleston*, 507 U.S. ____, 113 S.Ct. 1095, 122 L.Ed.2d 421 (1993) and *Koch Fuels v. State ex rel Tax Commission*, 862 P.2d 471, 474, 476 (Okla. 1993) (court held the delivery, and thus the sale, of fuel oil occurred in Oklahoma, even though it was "extracted", "withdraw[n]", or "pulled" from the pipeline outside Oklahoma), are consistent with *McGoldrick* and *Dilworth*. A sales tax may be imposed on the delivery of goods or the performance of services within the taxing state, but it is invalid under the Commerce Clause if it is imposed merely on the execution of the agreement and payment thereof to acquire such goods or the services.[9]

[9] Oklahoma's assertion that the tax in question applies to a "local activity" regardless of where the transportation services are in fact performed is also contrary to the thought expressed in footnote 2 of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a decision wherein the Court examined a tax it denominated as a Mississippi sales tax on transportation services. Although the Court assumed *arguendo* that the transportation services in question required scrutiny under the Commerce Clause (see footnote 4 of *Complete Auto*), the Court recognized that the Mississippi tax was imposed only upon activity which was arguably intrastate, because the transportation services were performed within Mississippi: "the tax has been applied only to commercial transactions in which **a distinct service is performed and payment made** for transportation from one point **within the State** to another point **within the State**" (Emphasis Added). *Id.* at 275, n.2. The place where the transportation services were performed was the factor considered by the Court when addressing whether the activity taxed was a local activity or interstate commerce.

The Commission argues that the relevant local activity taxed here was the "purchase" of the bus ticket from Jefferson or purchasing the transportation services:

> The tax is imposed upon the sale itself, not upon the thing purchased nor upon anyone's occupation or income; and it is imposed only when the sale occurs within the State. The taxable event is complete when the *sale* is made -- in this case, when the bus ticket is bought and paid for.

Petitioner's Brief at 8. But as set forth above, the "sale" under the statute **is** the "furnishing or rendering of services." In order for the tax to be "imposed only when the sale occurs within the state," the services must be furnished or rendered within the State. In the case of transportation for hire, the transportation (not the "purchase" of the ticket) must be furnished or rendered within Oklahoma. The tax in this case is necessarily a tax on services (the thing purchased) and may not be sustained on the basis that the bus ticket was "bought and paid for" in Oklahoma.

This is not a "garden-variety" sales tax imposed as a result of a "unijurisdictional event" which no other State can tax. Petitioner's Brief at 8-9. This was recognized by the Eighth Circuit when it stated, "[w]e will not separate the sale of a piece of paper from the **service** which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities." *Jefferson Lines*, 15 F.3d at 92. (Emphasis Added). The Commission's position is not consistent with the express language of the Taxing Statute and the decisions referred to herein which demonstrate that Section 1354(1)(C) is not a tax on a sale of transportation or a bus ticket -- it is a tax on the furnishing or rendering of

transportation for hire. Transportation services rendered outside Oklahoma cannot be taxed under Section 1354(1)(C).

C. OKLAHOMA STATUTES TITLE 68 SECTION 1354(1)(C), AS IT APPLIES TO INTERSTATE TRANSPORTATION FOR HIRE, BURDENS INTERSTATE COMMERCE BECAUSE IT FAILS TO SATISFY THE FOUR-PRONG TEST OF *COMPLETE AUTO.*

1. The Commerce Clause And *Complete Auto.*

The Commerce Clause of the Constitution Art. I, Section 8, Clause 3, provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Even where Congress has not acted affirmatively to protect interstate commerce, the Clause prevents States from discriminating against that commerce. *D.H. Holmes, Co., Ltd. v. McNamara*, 486 U.S. 24, 29 (1988); *Associated Industries v. Lohman*, ____ U.S. ____, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994); *Quill Corp.*, 504 U.S. ___, 112 S.Ct. 1904, 119 L.Ed.2d 91, 104 (1992). The Court has examined the validity of numerous state tax statutes under the Commerce Clause.

After years of wavering doctrinal lines, this Court in *Complete Auto* made it clear that a state tax which taxes interstate commerce can be upheld as not violating the Commerce Clause:

> when the tax is [1] applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state.

Complete Auto, 430 U.S. 274, 278 (1977); *see also*, *Quill*, 504 U.S. ____, 112 S.Ct., ___, 119 L.Ed.2d 91 (1992). *Complete Auto* and subsequent decisions have held that the test is not whether the tax is on interstate commerce, but whether a tax produces a forbidden effect on such commerce. *Complete Auto*, 430 U.S. at 288.

In order to survive a Commerce Clause challenge, a state taxing statute must satisfy each prong of the *Complete Auto* four-prong test. *Goldberg*, 488 U.S. at 260-268. The Eighth Circuit and District Court below examined only the "fair apportionment" prong. Jefferson maintains that the Oklahoma Taxing Statute and the Commission's application thereof to the interstate transportation in question fails to satisfy any of *Complete Auto's* prongs. Because the tax upon which the Commission's claims are based is violative of the Commerce Clause, the Commission's claim should be disallowed in total.

2. Lack Of Substantial Nexus: The Receipt Of And Payment For An Interstate Bus Ticket Within Oklahoma Does Not Provide Substantial Nexus Between Oklahoma And That Portion Of The Interstate Travel That Occurs Outside Oklahoma.

Complete Auto requires that the tax be "applied to an activity with a substantial nexus with the taxing state." *Quill*, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d at 107. The "minimum contact" found to be sufficient under a Due Process nexus analysis is not sufficient to satisfy the "substantial nexus" required under the Commerce Clause. *Id.*

To withstand Commerce Clause scrutiny, a relationship must exist between the **activity taxed** and the services provided by the taxing authority and that relationship must be **substantial**. *Id.* at 107. The Taxing Statute must fall unless there is a substantial nexus between that portion of the interstate transportation which occurs outside of Oklahoma, the activity which Oklahoma seeks to tax, and the State of Oklahoma. This is not the case.

The Commission relies on *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977) to assert that the substantial nexus prong is satisfied. The Commission points to the totality of Jefferson's activities within the state, including Jefferson's "sale" of tickets within Oklahoma. The Commission's reliance on Jefferson's contacts and *National Geographic*, however, is misplaced, because it fails to address the relationship between (or absence thereof) the **activity** being taxed (that portion of interstate travel that occurs outside Oklahoma) and Oklahoma.

As established above, the activity being taxed is the furnishing or rendering of transportation services. With regard to transportation services rendered outside Oklahoma, the only relationship between that activity and Oklahoma is that Oklahoma is the place where the ticket is delivered and payment is made. Furthermore, unlike the case in *Goldberg*, the "thing being purchased" is not limited to residents of the taxing state.[10]

The Commission cannot, in **all** taxable situations covered by the Taxing Statute, demonstrate a substantial nexus between the activity being taxed and Oklahoma. This is perhaps best evidenced by an example where a ticket is delivered in Oklahoma and all of the transportation services are rendered outside Oklahoma (e.g., a roundtrip ticket issued in Oklahoma for bus travel between Caney, Kansas and Minneapolis, Minnesota). Oklahoma would lack substantial nexus with the transportation service rendered in Kansas, Minnesota and the points in between. Yet the Taxing Statute is sufficiently broad to tax the entire gross receipts from those services as if all of the services were performed in Oklahoma.

The delivery of and payment for a bus ticket in Oklahoma establishes some minimal nexus with Oklahoma.

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[10] For example, if a bus ticket was purchased via an interstate telephone call to Bartlesville, Oklahoma by a resident of Caney, Kansas for travel between Caney, Kansas and Minneapolis, Minnesota, the taxpayer's sole contact with the State of Oklahoma would be through interstate activity. This Court has previously held that a vendor is free from the duties to collect sales and use taxes imposed by a State when its only connection with the taxing state is through some form of interstate activity (common carrier, U.S. mail). *Quill*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 108; see also *National Bellas Hess Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967).

However, such nexus is insufficient to satisfy the substantial nexus required under the Commerce Clause.

3. The Taxing Statute Is Not Fairly Apportioned: The Taxing Statute Is Not Fairly Apportioned Because It Subjects Interstate Commerce To Multiple Taxation And Enables Oklahoma To Exact A Tax On Activities To Which Oklahoma Bears No Special Relation Or Confers Any Proportionate Benefit.

It is undisputed that the Taxing Statute is unapportioned. While not constitutionally invalid per se, an unapportioned tax is constitutionally suspect because of the risk of multiple taxation. The requirement of apportionment is significant principally because it helps to insure that the tax will avoid the constitutional pitfalls of multiple taxation, or the risk of such taxation, and discrimination. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 170-71 (1983). The fact that a tax is unapportioned is constitutionally insignificant **only if** the tax can avoid the pitfalls of multiple taxation and discrimination. This Court examines the tax for **internal** and **external** consistency to determine whether it is fairly apportioned. *Goldberg* 488 U.S. at 361. Internal consistency addresses the threat of multiple taxation caused by another state's adoption of an identical tax statute. External consistency addresses both the unfairness of a tax imposed on an activity to which the taxing state bears no special relation or confers any proportionate benefit and the threat of multiple taxation caused by another state's imposition of a tax that is similar in nature.

a. The Taxing Statute is not internally consistent because it necessarily creates multiple taxation if another state adopts an identical statute.

Internal consistency focuses on the text of the challenged statute and hypothesizes a situation where other states have passed an identical statute. *Goldberg*, 488 U.S. at 261. To be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result. *Id.* The Taxing Statute imposes a tax on transportation for hire, without regard to the origin or destination of the trip or where a bus ticket is delivered, and arguably, without regard to where the services are rendered. Oklahoma's statute does not speak of bus tickets or contain a credit mechanism. An identical statute passed by another state would necessarily include Section 1354(1)(C) and the Section 1352(L)(4) definition of a sale of services (i.e. furnishing or rendering of services), and necessarily would not contain any credit for taxes paid to another state. Should other states adopt an identical statute the Taxing Statute and the Commission's application thereof create the threat of multiple taxation (hereinafter "identical taxation") and therefore internal inconsistency, in at least two situations. The absence of a credit mechanism means that identical taxation cannot be eliminated.

The first situation is one where Section 1354(1)(C) is applied differently by Oklahoma and at least one other taxing jurisdiction. Oklahoma might choose to apply Section 1354(1)(C) only to those tickets delivered in Oklahoma, but another state might choose otherwise and impose the tax on the basis of where services are rendered. The other state would tax transportation services rendered in its state even though the ticket was delivered in Oklahoma. The identical taxation in

this situation would occur because one state chose to apply the statute in accordance with the definition of Section 1352(L) (i.e. where services were rendered), while another (Oklahoma) applied the identical statute on the basis of tickets delivered within its state.[11] The absence of a credit mechanism in both states' statutes means this identical taxation could not be eliminated.

The second situation in which identical taxation could arise hypothesizes that Oklahoma and the other taxing state each disregard where the ticket was delivered and instead apply Section 1352(L) so as **not** to be limited to those services rendered within the taxing state. Oklahoma asserts that Section 1352(L) entitles it to tax the entire gross receipts of a sale of transportation regardless of whether that transportation is furnished or rendered in Oklahoma. Another state with an identical statute could do the same. Identical taxation would necessarily result. The entire gross receipts of the ticket delivered in Oklahoma for travel between Minneapolis, Minnesota and Madison, Wisconsin could be subject to Oklahoma's, Minnesota's and Wisconsin's taxing statutes in this situation. Once again, the absence of a credit mechanism means the identical taxation would not be eliminated.

If the express language of the Taxing Statute is respected, identical taxation would be avoided only if Oklahoma and the other states each limited the tax to gross receipts from transportation services furnished or rendered within its state (or

[11] *See* Finding of Fact Conclusion of Law Regarding the Tax Claim of the Oklahoma Tax Commission, *In re Eagle Bus manufacturing (Greyhound), et al.*, Case No. 90-00985-B-11 to 90-00990-B-11 (Bankr. S.D. Tex. 1993); Respondent's Addendum (hereinafter "Respondent's Add. ____") at 7-8.

amended the statute to provide a credit for taxes paid to another state). The Taxing Statute is not internally consistent, fails the apportionment prong, and is thus, violative of the Commerce Clause.

b. The lower courts correctly determined that the Taxing Statute is not externally consistent.

The Commission contends that the Eighth Circuit decision is in conflict with the applicable decisions of this Court and the Oklahoma Supreme Court. The Commission's contentions are based upon inconsistent reasoning which mischaracterizes the taxable activity and ignores the practical and economic effect of the tax on interstate commerce. The Taxing Statute is not externally consistent because it: (1) taxes revenue attributable to more than the in-state component of the activity being taxed; (2) creates a risk of multiple taxation; and (3) fails to provide a credit provision to avoid the risk of multiple taxation.

(1) The Taxing Statute taxes revenue attributable to more than the in-state component of the activity being taxed.

This Court in *Goldberg* stated that:

> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

Goldberg, 488 U.S. at 262. In examining a tax under external consistency, a court must examine the in-state business activity

which triggers the taxable event and the practical or economic effect of the tax on that interstate activity. *Id.* To be externally consistent, a tax on the gross receipts of interstate transportation services must be apportioned to reflect the fact that a portion of the gross receipts of the sale of interstate transportation services is attributable to activity in other states. *See Goldberg*, 489 U.S. at 264 citing *Central Greyhound*, 334 U.S. at 663.

The Eighth Circuit recognized that the price of interstate bus transportation reflects the value of the transportation service rendered or furnished in other states. *In re Jefferson Lines*, 15 F.3d 90, 92 (8th Cir. 1994) ("a ticket price is set at least partially on the number of miles travelled"). Oklahoma taxes the entire gross receipts of interstate transportation services without any regard to the fact that a significant portion of the miles travelled are outside Oklahoma. By imposing a tax on the gross receipts of the interstate transportation services, Oklahoma seeks to collect a tax that cannot "reasonably reflect the in-state component of the activity being taxed," *i.e.* transportation services. *Goldberg*, 488 U.S. at 262.

For example, an interstate bus ticket delivered in a town within Oklahoma and close to the Oklahoma border for a trip which proceeds immediately across the Oklahoma state line is taxed at the very same rate as a bus ticket delivered in a town in the middle of Oklahoma for "intrastate" transportation service which solely uses Oklahoma roads. The amount of tax levied by Oklahoma on interstate transportation services has absolutely no relationship with the "in-state component of the activity being taxed." *Id.* Permitting Oklahoma to levy a tax on the entire gross receipts of the interstate transportation

services would enable Oklahoma to receive tax revenue which logically and directly results from out-of-state activities.

(2) ***Central Greyhound Lines, Inc. v. Mealey***

As set forth at the outset, this Court has previously addressed the constitutionality of a tax on interstate bus transportation. *See Central Greyhound*, 334 U.S. at 655-56. In *Central Greyhound*, this Court concluded that an unapportioned tax imposed on the gross receipts of transportation services was an impermissible burden on interstate commerce. *Id.* "The vice of such a tax is that it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions.'" *Id.* at 663. Since Oklahoma taxes the entire gross receipts of the transportation regardless of the pro rata portion of the trip which occurs in the state, Oklahoma is attempting to directly burden every mile and dollar relating to interstate travel. To impose a tax as if the activity is confined solely to Oklahoma does not eliminate the relation of the other states to the activity nor eliminate the benefits which the other states confer upon the activity within their borders. *Id.* at 660.

The principles and reasoning of *Central Greyhound* remain sound even after *Complete Auto*, as is evidenced by this Court's use of the decision in *Goldberg* to demonstrate that the external consistency test is essentially a practical inquiry. *Goldberg*, 488 U.S. at 264. Nonetheless, the Commission necessarily asserts that the reasoning of *Central Greyhound* is "inapposite" to the present case, an argument the lower courts have rejected out of hand. The Commission seeks to distinguish *Central Greyhound* either on the grounds: (i) that the tax in *Central Greyhound* concerned a tax on the "gross

receipts from transportation" as opposed to the Taxing Statute in this case which is a tax on the "gross receipts ... of each sale of ... transportation for hire," or (ii) the tax in *Central Greyhound* was an "income tax." *Central Greyhound*, 334 U.S. at 654; OKLA. STAT. tit. 68 § 1354(C)(1); Petitioner's Brief at 12-13. Neither is correct. The first distinction is not constitutionally significant, and the second distinction is totally unsupportable.[12] This Court and other Courts have rejected arguments which attempt to distinguish precedent based upon the label of the tax. *See International Harvester v. Dep't of the Treasury*, 322 U.S. 340, 349 (1944); *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531, 536 (Tenn. 1985) (rejecting argument that *Ingram-Richardson, supra* was not applicable to Commerce Clause analysis of a sales tax because it involved a gross receipts tax rather than a sales tax). Furthermore, *Complete Auto* emphasizes the importance of "looking past the formal language of the tax statute to its practical effect." *Quill* 504 U.S. at ___, 112 S.Ct at ___, 119 L.Ed.2d at 105; *Complete Auto*, 430 U.S. at 279. A tax with the same economic and practical impact held to be unconstitutional should not be found constitutional because of "magic words or labels." *Quill* 504 U.S. at ___, 112 S.Ct at ___, 119 L.Ed.2d at 105. Adopting the Commission's "formal" distinction of *Central Greyhound* would allow the constitutional validity of a tax statute to "hinge on legal terminology, draftsmanship and phraseology." *Id.*; *Complete Auto*, 430 U.S. 274. As noted by the Eighth Circuit, the distinction between *Central Greyhound* and this case is not

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[12] *Complete Auto* rejected attaching "constitutional significance" to the semantic difference the Commission seeks to place upon a tax on the gross receipts and a gross receipts tax. *Quill* 504 U.S. at ___, 112 S.Ct. at ___, 119. Ed.2d at 105; *Complete Auto*, 430 U.S. at 288.

significant enough to bear the weight the Commission seeks to place upon it. *Jefferson Lines*, 15 F.3d at 93.

(3) Because the Taxing Statute is imposed on activity dealing with the movement of tangible objects over identifiable routes, it should be apportioned to reflect the in-state component of such activity.

The Commission's contention that the tax is externally consistent and does not need to be apportioned because the taxable activity is the sale of a ticket, not of interstate transportation services and thus, is imposed upon a "purely local event" is without merit.[13] The Eighth Circuit refused to accept the Commission's argument as "too technical and [one

[13] Furthermore, by characterizing the tax as not on interstate transportation services, but merely a "bus ticket", the Commission attempts to "localize" the taxable transaction within the borders of Oklahoma much the same way the State of New York tried to "localize" the gross receipts of Greyhound solely within the borders of New York. *Central Greyhound*, 334 U.S. at 660.

When analyzing state taxes under the Commerce Clause, this Court in *Central Greyhound* and thereafter has rejected such formalistic reasoning asserted by the Commission, but instead has consistently focused on the economic and practical realities of the tax. *Central Greyhound*, 334 U.S. at 657; *Goldberg*, 488 U.S. at 262. As recognized by this Court in *Central Greyhound*, legal fictions of the kind the Commission is presently asserting (localizing interstate transportation services) are especially dangerous in the disposition of constitutional issues, because of the risk of confounding both users and not merely readers. 334 U.S. at 659.

which] flies in the face of how bus ticket prices are set." *Jefferson Lines*, 15 F.3d at 92. The Eighth Circuit further reasoned:

> To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

Jefferson Lines, 15 F.3d at 92.

The formalism of the Commission's argument ignores the practical inquiry of the external consistency test. *Goldberg*, 488 U.S. at 264. This is a tax on interstate transportation for hire: it is obvious that a tax on such transportation could be apportioned by the miles traveled within a particular state. In fact, this Court in numerous cases has approved apportionment formulas for taxes based upon miles traveled in a state especially when the tax dealt with the movement of large physical objects over identifiable routes. *Id.* citing *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987) (trucks); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (cargo containers); *Complete Auto, supra* (motor carriers); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) (oil pipelines); and *Central Greyhound Lines, Inc. v. Mealey, supra* (buses); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (tax on gross receipts of intrastate train travel is valid while a like tax on interstate train travel is not).

The Commission further asserts that apportionment is unnecessary because it is merely utilizing a "sales tax" *measured by* the gross receipts of the sale of interstate transportation services.[14] The Commerce Clause is not interested in the label of the tax, but that the tax is a "**fair measure** of a state's contacts with a given commercial transaction in all four aspects of *Complete Auto*." *Itel Containers v. Huddelston*, 507 U.S. ___, 113 S.Ct. ___, 122 L.Ed.2d 421, 436 (1993) [Emphasis Added]. Local taxes **measured by gross receipts** from interstate commerce have often been pronounced unconstitutional. *See Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 255-56 (1938) [Emphasis Added].[15]

[14] The Commission's position ignores a truism of economics. That being, as discussed earlier, "a tax is as much a tax on the measure as it is a tax on the so-called subject." Jenkins, at 242.

[15] "The vice characteristic of those taxes which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed *Fargo v. Michigan*, 121 U.S. 230 (1887); *Philadelphia & S.S. Sou. Co. v. Pennsylvania*, 122 U.S. 326 (1887); *Galveston, H. & S. A.R. Co. v. Texas, supra.* (210 U.S. 217, 28 C. Ct. 638 (1908); *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298 (1912) or added to *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650 (1936), with equal right by every state which the commerce touches merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. *See Philadelphia & S.S. Sou. Co. v. Pennsylvania, supra.* 346; *Case of State Freight Tax*, 15 Wall. 232, 280 (1872); Bradley, J. dissenting in *Maine v. Grand Truck Ry. Co.*, 142 U.S. 217, 235 (1891); cf. *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. at 26 (1891)." *Western Livestock*, 303 U.S. at 255-256.

The Taxing Statute is not a "realistic legislative solution to the technology of the present-day" bus transportation industry. *See Goldberg*, 489 U.S. at 265. Rather the Commission seeks to accomplish that which this Court prohibited in *Central Greyhound*. Five lower courts have dealt with this issue, and each of the five has concluded that this is an unapportioned tax which violates the Commerce Clause of the United States Constitution.[16]

(4) The Taxing Statute is not externally consistent because it results in multiple taxation.

The Taxing Statute's failure to limit the levy to those gross receipts relating to transportation services rendered in Oklahoma creates a substantial threat of multiple taxation on interstate transportation services, a factor to consider in determining whether a state tax is externally consistent. *Goldberg*, 488 U.S. at 261-262. For this purpose, multiple taxation need not occur under an identical statute. *Id.* at 261; *Armco v. Hardesty*, 467 U.S. 638, 644 (1984) (analysis of similar but not identical tax to demonstrate multiple taxation). Even if no other state sought to tax its proportionate share of the revenue from interstate transportation, such abstention

[16] *See In re Jefferson Lines, Inc.*, BKY No. 3-89-4137, United States Bankruptcy Court, District of Minnesota (1992), Joint Appendix at 7; *In re Jefferson Lines, Inc.*, Civil. No. 3-92-467, United States District Court, District of Minnesota (1992), Joint Appendix at 17; *Oklahoma v. Jefferson Lines, Inc. (In re Jefferson Lines)*, 15 F.3rd 90 (8th Cir. 1994), Joint Appendix at 24; *In re Eagle Bus Manufacturing, Inc.*, et al., Case No. 90-00985-B-11 to 90-00990-B-11, United States Bankruptcy Court, Southern District of Texas (1993), Respondent's Addendum A; *In re Eagle Bus Manufacturing, Inc. et. al.*, Civil Action No. B-93-58, United States District Court, Southern District of Texas (1993), Respondent's Addendum B.

would not justify the taxing by Oklahoma of the entire gross receipts of the interstate transportation service. *Id. See also Central Greyhound*, 334 U.S. at 663.

To see the risk of multiple taxation, one need only consider a scenario where a state other than Oklahoma imposes a use tax or a gross receipts tax relating to the portion of the bus route which takes place in that state. The Commission's position requires Jefferson to collect an Oklahoma sales tax on the entire gross receipts of the interstate transportation services. In addition, Jefferson could be required to collect a use tax or gross receipts tax in each of the other states through which its transportation services are rendered. The result would be multiple taxation on interstate commerce.[17]

(5) The Taxing Statute is not externally consistent because absent a credit mechanism the risk of multiple taxation cannot be avoided.

The risk of multiple taxation demonstrated above points out another fundamental flaw of the Taxing Statute -- the absence of a credit for taxes (such as use taxes or gross receipts taxes) paid to other states. Because the Taxing Statute fails to provide a credit for taxes paid to other states on the transportation services rendered in those states, the Taxing Statute cannot eliminate this multiple taxation. *Goldberg* 488 U.S. at 264; *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988) (The ... taxing scheme is fairly apportioned, for it

[17] The Commission acknowledged the similarity between the Oklahoma sales tax and the Oklahoma use tax when it cited *Oklahoma Tax Commission v. Sisters of the Sorrowful Mother*, 97 P.2d 888 (Okla. 1940) in the Petitioner's Brief for the proposition that the **sales** tax is not a tax on property or income. *Sisters of the Sorrowful Mother* is a **use** tax case.

provides a credit against its use tax for sales taxes that have been paid in other states). *See also, Griffes v. Barringer*, 1 F.3d 1331 (2d Cir. 1993) *cert denied* ____ U.S. ____, 114 S.Ct. 879, 127 L.Ed.2d 75 (1994) (absent a credit provision multiple taxation would burden interstate commerce).[18]

c. Contrary to the Commission's assertions, the economic incidence of this tax is not in accordance with the principles of this Court's Commerce Clause decisions.

(1) *McGoldrick, Wardair, Itel.*

The Commission appears to assert that because the Taxing Statute is a sales tax, this court need not scrutinize the tax under the *Complete Auto* test. Regardless of the nature of the state tax on commerce, the tax must be scrutinized to determine whether it imposes a disproportionate and discriminating burden on interstate commerce.[19]

[18] The Commission contends that a credit provision is unnecessary because no multiple taxation will result because an income tax imposed by another state does not constitute multiple taxation. Without conceding this point, the most obvious source of multiple taxation in this sales tax context is a use tax on the purchaser and consumer imposed by another state within which the interstate transportation services would be rendered. *See Associated Industries of Mo. v. Lohman*, ____ U.S. ____, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994) (there is no dispute that sales taxes and use taxes are imposed on substantially equivalent events). As the discussion above demonstrates, this Court recognizes that absent credit provisions, a use tax may create multiple taxation with respect to an activity that is the subject of a sales tax.

[19] As recognized by Justice Stevens in his concurrence in *Goldberg*, it is insufficient to say in response to a discrimination claim that the tax is a sales tax. *Goldberg*, 488 U.S. at 269 n.1 (Stevens, J. concurring). Because

The Commission asserts that the Eighth Circuit's decision is inconsistent with *McGoldrick v. Berwind-White Coal Mining Co.* *McGoldrick* is discussed earlier at pages 15-16 herein. This Court upheld the tax in *McGoldrick* because it was imposed on goods delivered in the taxing jurisdiction, not because the contract was executed in that jurisdiction. *Id.* at 58. *McGoldrick* does not stand for the proposition, as the Commission suggests, that sales taxes are exempt from Commerce Clause scrutiny or that the execution of an agreement is sufficient to justify imposition of a sales tax. *Id.*

Likewise, the Commission's argument that the tax on the sale of **interstate** transportation services is analogous to a tax on the discrete sale of goods is illogical. The Commission would like this Court to believe that the "purchase" of an interstate bus ticket is a discrete event in which only the State of Oklahoma has an interest. However, the Commission's reasoning ignores the fundamental notion that the "purchase" of a good (i.e., delivery) ends that good's participation in the stream of interstate commerce, at least for a time. On the other hand, the "purchase" of an interstate bus ticket necessarily triggers activity in multiple states and initiates the rendering of that service's participation in the stream of interstate commerce. *Goldberg*, 488 U.S. 262. The "purchase" of an interstate transportation service is not akin to the purchase (delivery) of a good which is merely utilized or has travelled in interstate commerce. Thus, the Commission's reliance on *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095, 122 L.Ed.2d 421 (1993) and *Koch Fuels, Inc. v. Oklahoma Tax Commissioner*, 862 P.2d

the Taxing Statute applies to interstate activity, the Court must go further. *Id.*

471 (Okla. 1993), which upheld state sales taxes on goods delivered in the taxing jurisdiction, is misplaced.[20] Those cases are consistent with the Court's long line of decisions which permit a state to impose a sales tax on the delivery of goods within that state.[21]

(2) *Goldberg.*

The Commission asserts that the Eighth Circuit opinion conflicts with this Court's reasoning in *Goldberg*. The nature of the activity being taxed and the tax act in *Goldberg* are substantially different from that in this case. Nonetheless, a careful analysis of *Goldberg* demonstrates that the Eighth Circuit opinion is in fact consistent with *Goldberg*.

In *Goldberg*, Illinois levied a telecommunications tax on the privilege of originating or receiving interstate telecommunications. *Goldberg*, 488 U.S. at 255-56. The tax was measured on the entire gross receipts of telephone calls that originated or terminated at an Illinois "service address". *Id.* at 256. The Court upheld the tax after extensive Commerce Clause analysis.

Arguably, the most difficult issue the Court faced in *Goldberg* was whether the tax was fairly apportioned. The

[20] The Taxing Statute attempts to tax transportation services furnished **outside** the taxing state.

[21] Although *Wardair* and *Itel* are consistent with said goods decisions, neither *Wardair* nor *Itel* offers constitutional analysis under the interstate Commerce Clause because the parties conceded that the taxes met the four prong test of *Complete Auto*. Rather, each case involved foreign commerce clause challenges. *Wardair*, 477 U.S. at 8; *Itel*, 507 U.S. at ___, 113 S.Ct. 1095, 122 L.Ed.2d at 436.

Court determined that the tax in *Goldberg* was fairly apportioned by examining the in-state component of the activity being taxed and the threat of multiple taxation. *Id.* at 262-264. First, it concluded that the tax reasonably reflected the in-state component of the activity being taxed because it "reasonably reflect[ed] the way that consumers purchase interstate telephone calls". *Id.* Second, the Court determined the stated threat of multiple taxation to be exaggerated; it recognized that most other states lacked a substantial nexus with the consumer's purchase of an interstate call; and further, to the extent there was a limited possibility for multiple taxation, Illinois provided a credit mechanism to avoid actual multiple taxation. *Id.* Finally, the Court acknowledged that due to "insurmountable administrative and technological barriers", the tax was incapable of being apportioned on the basis of mileage or some other geographic division. *Id.* at 263-65.

The Commission has relied on *Goldberg* to support its belief that the Taxing Statute "reasonably reflects the way that consumers purchase bus tickets -- in a single discrete event . . ." Petitioner's Brief at 19. The Commission ignores the economic realities. The Illinois Tax Act "reasonably reflect[ed] the way that consumers purchase interstate telephone calls" because consumers think of themselves as "purchasing telephone calls" as they use their telephones, that is as they speak on or otherwise communicate information from their Illinois service address to other telephones. The Court recognized the relevant intrastate activity to be the consumer's use at the service address, located within Illinois, and not the use of equipment or service situated or rendered in another state or another country, or perhaps in space high above the earth's surface. The Court further recognized that consumers of telephone calls, whether intrastate or interstate, do not

regard themselves as purchasing the "computerized network of electronic paths [that transmit] thousands of electronic signals per minute through a complex system of microwave radios, fiber optics, satellites and cables." *Goldberg*, 488 U.S. at 254 (Court's description of the technology in question in that case).[22] To the Illinois consumer subject to the tax in *Goldberg*, the use of the service address is essentially the same whether the call is made to or comes from the friend next door, the friend in California, or the friend halfway around the world. The same thing cannot be said about bus transportation services. By its very nature, interstate bus transportation necessarily involves travel through multiple states and very real physical contact with these states. A bus travels on highways and stops in various states for food, fuel and additional passengers. The purchaser of bus transportation is purchasing the service, not the ticket. Although the service may be rendered without the ticket, and the ticket may be delivered without the services, the purchaser does not consider the purchase to be complete until the services are performed.

Finally, it is significant that Illinois had no practical apportionment method at its disposal, but instead relied on a credit mechanism to prevent multiple taxation. *Goldberg* at 264. The tax properly was upheld in *Goldberg*. The Eighth Circuit's opinion is consistent therewith.

As the above demonstrates, the Taxing Statute contains three fundamental flaws which prevent it from being fairly apportioned: it does not limit the levy to those gross receipts that are related to the transportation services rendered within

[22] *See also Pioneer Telephone*, 832 P.2d at 851 (taxable event with respect to Oklahoma's sales tax as it applies to telephone calls occurs when the consumer receives the service).

Oklahoma, it creates the risk of multiple taxation, and it fails to provide a credit mechanism to prevent the multiple taxation that it necessarily creates. The Taxing Statute fails to satisfy the apportionment prong of *Complete Auto*.

4. The Taxing Statute Discriminates Against Interstate Commerce.

The third prong of *Complete Auto* prohibits a state from imposing a tax that discriminates against interstate commerce. *Complete Auto*, 430 U.S. at 331; *Goldberg*, 488 U.S. 252. The primary purpose behind the discrimination prong is to encourage free trade among the states; freedom to engage in commerce across state lines. To allow Oklahoma to impose a tax on the entire gross receipts of interstate transportation, which inherently consists of activity and services rendered in other states, would subject interstate commerce to the unfair burden of being taxed as to a portion of that revenue by a state which gives protection to that portion, as well as to the state which does not. *Central Greyhound*, 334 U.S. at 662; *Armco*, 467 U.S. at 644. That is, a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state. *D.H. Holmes*, 467 U.S. at 642.

This Court has previously held that "a tax may violate the Commerce Clause if it is facially discriminating, has a discriminatory intent or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Director, Div. of Taxation, N.J., Dep't of the Treasury*, 490 U.S. 66 (1989). The term "discriminatory taxation" is not self-defining, as such, discrimination like interstate commerce itself is a practical conception. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481

(1932). The Taxing Statute discriminates against interstate commerce for at least two reasons.

a. The Taxing Statute subjects interstate commerce to the risk of multiple taxation.

As established above, the Taxing Statute subjects interstate commerce to the risk of multiple taxation. To the extent that interstate transportation is subjected to multiple taxation, a risk not borne by intrastate transportation, discrimination against interstate commerce results. *Armco v. Hardesty*, 467 U.S. at 644-645 (1984).

b. The Taxing Statute discriminates against interstate commerce by allocating a disproportionate share of the tax burden to interstate travel.

Even though the Taxing Statute appears facially nondiscriminatory, the practical consequence of the tax is discrimination against interstate commerce. The interstate transportation services are taxed at the same 4% rate as the intrastate transportation services. A one hundred dollar ticket relating to a route entirely within Oklahoma will be taxed at the full 4% rate, or $4. A one hundred dollar ticket relating to travel only 10 percent within Oklahoma will also be taxed at the full 4% or $4, even though only 10 percent of the travel relates to travel within Oklahoma. It logically follows that Oklahoma will derive a disproportionate share of its tax revenue from interstate transportation. Oklahoma taxes interstate transportation services at the full rate, even if the service's relation to Oklahoma is trifling in quantity. A transaction (rendering of transportation services) which to a substantial extent actually takes place in other states should not

be taxed as if it takes place entirely in Oklahoma.[23] Accordingly, because Oklahoma fails to apportion this tax, interstate commerce is bearing more than its fair share of the costs associated with such interstate transportation services.

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[23] The full extent of the discrimination to interstate commerce caused by a unapportioned tax on interstate transportation was best described by Justice Frankfurter in his dissenting opinion in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950):

> So long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate carriers pay according to the facilities in fact provided by the State. But a tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is unlimited in form, and thus theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.
>
> * * * *
>
> And because it operates in other States there is danger -- and not a fanciful danger -- that the interstate carrier will be subject to the privilege taxes of several States, even though his entire use of the highways is not significantly greater than that of intrastate operators who are subject to only one privilege tax.

Id.

The Taxing Statute clearly favors intrastate transportation services by imposing an unapportioned tax on interstate transportation.[24] The Taxing Statute discriminates against interstate commerce by creating multiple taxation and by requiring interstate transportation to bear more than its fair share of the costs of services provided by Oklahoma and associated with such transportation. Accordingly, the Taxing Statute fails the third prong of *Complete Auto*.

5. The Oklahoma Taxing Statute Is Not Fairly Related To The Presence And Activities Of The Taxpayer In The State Of Oklahoma.

The fourth prong of the *Complete Auto* test requires that a state tax be fairly related to the presence and activities of the taxpayer in the taxing state. *Complete Auto*, 430 U.S. 274; *Goldberg*, 488 U.S. at 266. "The purpose of this test is to ensure that a state's tax burden is not placed upon persons who do not benefit from services provided by the State." *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981).

The purchaser of interstate transportation services receives some benefit from the transportation services rendered in Oklahoma. However, the passenger receives no benefit from Oklahoma with respect to those transportation services rendered in other states. The interstate transportation service is taxed as if all of the services were rendered in Oklahoma. A tax on the entire gross receipts of the rendering of interstate transportation

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[24] Moreover, the economic burden of the Taxing Statute does not necessarily fall only upon residents or "insiders" who can change the tax through the Oklahoma political system. *Goldberg*, 488 U.S. at 266. Thus, the user or consumer who pays the tax does not necessarily control the legislature who short sightedly laid the tax.

services is not fairly related to the benefit provided by Oklahoma. Accordingly, the Taxing Statute fails the fourth prong of *Complete Auto*.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Respondent, Jefferson Lines, Inc., respectfully requests that this Court affirm the decision of the Eighth Circuit Court of Appeals.

Respectfully Submitted,

Dated: September 9, 1994

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ADDENDUM A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:	)	
	)	
EAGLE BUS MANU-	)	Case No. 90-00985-B-11
FACTURING, INC.,	)	TO 90-00990-B-11
GREYHOUND LINES,	)	
INC., TRAILWAY	)	JOINTLY
COMMUTER TRANSIT,	)	ADMINISTERED
INC., BUSLEASE,	)	Case No. 90-00985-B-11
INC., GLI BUS	)	and
OPERATIONS	)	Case Nos. 90-01984-B-
HOLDING COMPANY,	)	11
GLI FOOD SERVICES,	)	TO 90-01989-B-11
INC., SOUTHERN	)	(Chapter 11)
GREYHOUND LINES,	)	
CO., GLI HOLDING	)	JOINTLY
COMPANY, CENTRAL	)	ADMINISTERED
GREYHOUND LINES	)	Case Nos. 90-00985-B11
CO., EASTERN	)	(Chapter 11)
GREYHOUND LINES	)	
CO., and WESTERN	)	
GREYHOUND LINES CO.	)	[Entered Feb 5, 1993]
Debtors.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE TAX CLAIM OF THE OKLAHOMA TAX COMMISSION

This matter came before the Court on the Objection of Greyhound Lines, Inc. ("Greyhound") to Claim No. 17,841 filed by the Oklahoma Tax Commission (the "Commission") for recovery of unpaid sales tax in the amount of $906,866.59 (the "Commission's Claim"). John B. Turner and Rebecca M. Fowler represent Greyhound. Douglas F. Price represents the Commission. The Court, having heard oral arguments on September 28, 1992, and having considered the briefs of the parties, and being fully advised in the matter, now makes the following findings of fact and conclusions of law in support of the Order Disallowing the Tax Claim of the Oklahoma Tax Commission:

I.

This Court finds that it has jurisdiction pursuant to 28 U.S.C. § 157(a) and 1334(b), and the Order entered on November 11, 1991, confirming the Third Amended Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Greyhound Lines, Inc. and Its Affiliated Debtors and that this is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

II.

This matter was submitted to the Court on stipulated facts. Greyhound, a Delaware corporation, is a common carrier providing transportation by bus in Oklahoma and many other states. The transportation provided by Greyhound is interstate commerce. Greyhound provides transportation on interstate and intrastate routes. An interstate route is a route which originates in one state and crosses over into another state. An intrastate route is a route solely within a single state.

Greyhound sells tickets in Oklahoma for transportation on the following types of routes:

a. an intrastate route wholly within the State of Oklahoma;

b. an intrastate route wholly within a state other than Oklahoma;

c. an interstate route which commences in Oklahoma and terminates in another state;

d. an interstate route which commences and terminates in Oklahoma, but passes through another state; and

e. an interstate route wholly outside the State of Oklahoma.

The Commission, under authority of Oklahoma law, applies a sales tax at a single specified rate to all tickets for transportation sold in Oklahoma. Greyhound, operating under Oklahoma Sales Tax Permit No. 458229, remits, to the state, sales tax on all tickets sold for transportation on an intrastate route wholly within the State of Oklahoma.

Greyhound filed a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. The Commission subsequently filed claims in Greyhound's case seeking payment of tax on all tickets sold by Greyhound in Oklahoma during the period June 1, 1987 to May 31, 1990, except those sales for which Greyhound had previously remitted tax, and those sales to governmental entities and

churches which the Commission had determined to be exempt from tax. The total amount in controversy is $906,866.59.

Greyhound objects to the allowance of the claims on the basis that application of Oklahoma's sales tax to the gross receipts from tickets sold in Oklahoma for transportation on routes other than intrastate routes within Oklahoma violates the Commerce Clause of the Constitution.

III.

The issue before the Court is whether the Oklahoma sales tax statute, which levies a tax on the gross receipts from sales of tickets for transportation by bus, violates the Commerce Clause of the United States Constitution.

IV.

Oklahoma collects sales tax from Greyhound pursuant to the Oklahoma Sales Tax Code. 68 O.S. § 1354(1)(C)[25]. Greyhound argues that imposition of the tax on gross receipts from sales of tickets for any transportation other than on an intrastate route wholly within the State of Oklahoma violates the Commerce Clause of the Constitution.

The United States Constitution expressly authorizes Congress to "regulate commerce with foreign Nations, and

25. The statute reads in pertinent part: Transportation for hire to persons by common carriers, including railroads, both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause has consistently been interpreted to prohibit actions by the states which interfere with interstate commerce. See, e.g., South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938). The clause, however, may not be used to "relieve those engaged in interstate commerce from their just share of state tax." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

In order to survive constitutional scrutiny, a state tax on interstate commerce, such as the transportation provided by Greyhound, must reflect an appropriate balance between freedom from interference and responsibility for paying a fair share. The Supreme Court identified that balance in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Deciding that it was the practical effect of a state tax which determines it constitutionality, the Complete Auto Court articulated a four-prong test with which to evaluate the effect of a tax. A state tax will be found to be constitutional only if: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the taxing state. Id. at 279.

In order to withstand constitutional scrutiny, a state must satisfy each prong of the test. The Oklahoma tax at issue here cannot withstand this test.

A. Nexus

The first prong of the Complete Auto test determines whether the activity subject to the tax has a substantial nexus

with the taxing state. To satisfy this prong of the test there must be a relationship between the activity taxed and the state, and that relationship must be substantial. Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992).

The activity at issue here is transportation on all routes except those wholly within the state of Oklahoma. The Commission, relying on National Geographic Society v. California Bd. of Equalization, argues that the mere sale of the ticket within the state satisfies the requirement that there be a substantial nexus between transportation and the state. 430 U.S. 551 (1977). The National Geographic Court, however, addressed the situation where a California resident received goods in California from an organization which maintained offices in California. The facts in this case, however, differ from those in National Geographic.

Here, Greyhound acknowledges that it maintains offices within the State of Oklahoma. There is, however, no evidence that the transportation at issue is purchased by a resident of Oklahoma. More importantly, the evidence clearly demonstrates that in all instances a portion of the transportation purchased is not received within Oklahoma. Furthermore, in some instances, none of the services received within the state. The conclusion reached in National Geographic, therefore, does not apply here.

The Commission has failed to demonstrate here that there is more than a de minimis connection between the activity at issue and the state. The tax thus fails to satisfy the first prong of the Complete Auto text.

B. Apportionment

The second prong of the Complete Auto test requires that a state tax on an interstate activity be fairly apportioned. 430 U.S. at 279. This requirement ensures that each state taxes only its fair share of an interstate transaction. Goldberg v. Sweet, 488 U.S. 252, 263 (1989). Because there is no single apportionment formula, the taxing statute must be analyzed to determine if it is internally and externally consistent. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 161 (1938).

1. Internal Consistency.

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute." Goldberg, 488 U.S. at 263.

The statute at issue here imposes a tax on the gross receipts of each sale of "transportation for hire to persons by common carrier, including . . . motor transportation companies." 68 O.S. § 1354(1)(C). Because the statute fails to identify the point of sale, it allows Oklahoma to tax transportation sold in Oklahoma which occurs partially or completely within another state. The statute also allows Oklahoma to tax transportation sold in other states which occurs within Oklahoma. The text of the statute thus allows Oklahoma to tax the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The transportation at issue here occurs, at least partially, in a state other than Oklahoma. If those states in which transportation occurs had a statute identical to Oklahoma's,

those states would be able to tax the transportation which occurred within their boundaries. For example, if one of the tickets sold in Oklahoma was for travel between Dallas and Houston, Oklahoma would tax the transaction because the ticket sold in Oklahoma, and Texas, if it had an identical statute, could tax the transaction because the transportation occurred in Texas.

The Supreme Court has noted with emphasis that only a tax scheme which allows credits for taxes collected by other states on the same transactions can survive the test of constitutionality. Goldberg, 488 U.S. 256. Oklahoma has no such provision for tax credits. Because the practical possibility of multiple taxation exists here, Oklahoma's taxing statute, therefore, is not internally consistent.

2. **External Consistency.**

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. at 262. A state tax may thus be applied only to those activities which occur within its borders. Complete Auto, 430 U.S. at 282.

The Oklahoma tax on this interstate activity does not reflect only the in-state component of those activities. Here, Oklahoma attempts to tax a specific interstate activity which physically occurs outside the state. The tax, therefore, is not externally consistent.

The Commission argues that by taxing transportation occurring outside Oklahoma for which tickets are sold in Oklahoma and not taxing transportation which occurs in

Oklahoma for which tickets are sold elsewhere, the state recovers an amount equivalent to what it would recover if it taxes all transportation within the state. The Commission thus argues that the tax is self apportioning.

The Commission cited no authority for this novel theory, and there appears to be none. Moreover, even if there were support in the existing law, the Commission is unable to demonstrate that the proceeds of the tax do, in fact, reflect the transportation provided by Greyhound within the state of Oklahoma. The Commission offers no factual basis for its assumptions and such unfounded assumptions are not sufficient to satisfy the Complete Auto external consistency test.

The Oklahoma statute imposes a tax on activities which physically occur outside its borders. The statute, therefore, clearly fails to satisfy the external consistency prong of the Complete Auto test.

C. **Discrimination Against Interstate Commerce**

The third prong of the Complete Auto test requires the taxing authority to demonstrate that the tax does not discriminate against interstate commerce. Such discrimination can be reflected on the face of the statute, the intent of the statute, or the practical effect of the statute. Amerada Hess Corp. v. Director. Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). Here, discrimination against interstate commerce is reflected in the practical effect of the statute.

The tax at issue here is applied to the gross receipts from the sale of a ticket including tickets reflecting travel on an interstate route passing through Oklahoma. An interstate

traveler on one of these routes traveling the same number of miles within the state on an intrastate route will thus pay a greater amount of tax. The tax, therefore, imposes a disproportionate burden on interstate travel. See American Trucking Association, Inc. v. Scheiner, 483 U.S. 266 (1987). Because the tax is discriminatory, it fails to pass the third prong of the Complete Auto test.

D. Relation to State Services

The fourth prong of the Complete Auto test analyzes whether the tax imposed is fairly related to the presence and activities of the taxpayer within the state. "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

Here, the taxpayers are the bus passengers. There is no dispute that the in-state activities of those passengers benefit from the services provided by the State of Oklahoma, which are funded at least in part by the tax at issue. The passengers whose transportation is at issue here, however, are taxed on out-of-state activities as well as in-state activities, and some passengers are taxed on their out of state activities when they have no in-state activity at all.

The out-of-state activities of Greyhound's passengers, which are taxed at the same rate as in-state activities, receive no benefits from the state of Oklahoma. Those out-of-state activities are benefited instead by the services provided by the other states in which those activities are conducted. There is thus no relation between the tax on transportation which occurs outside the state and services provided by the state within

Oklahoma. The tax at issue here, therefore, fails the fourth prongs of the Complete Auto test.

V.

The tax at issue here is unable to satisfy all four prongs of the Complete Auto test. Greyhound, therefore, is entitled to an order sustaining its objection to the Commission's Claim. The Commission's Claim is disallowed because it reflects a tax on the gross receipts from Greyhound's sales of transportation over routes outside the state and is thus levied in violation of the Commerce Clause of the United States Constitution. A separate order based on the foregoing findings of fact and conclusions of law shall be entered.

Date: FEB 3 1993

/s/ Richard S. Schmidt
Richard S. Schmidt
United States Bankruptcy Judge

ADDENDUM B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:	§	
	§	
EAGLE BUS MANUFACTURING,	§	
INC., ET AL,	§	Civil Action
Debtor,	§	No. B-93-58
	§	
STATE OF OKLAHOMA, ex rel.	§	
OKLAHOMA TAX COMMISSION	§	
Appellant,	§	[Filed
	§	Oct. 4, 1993]
VS.	§	
	§	
GREYHOUND LINES, INC.,	§	
Appellee.	§	

OPINION

The aforementioned cause number represents an appeal from an order entered by the Bankruptcy Court for the Southern District of Texas, Brownsville Division denying claim number 17841 in Greyhound Lines, Inc. voluntary Chapter 11 petition jointly administered as Bankruptcy No. 90-00985-B-11.

STATEMENT OF THE CASE

Greyhound is a common bus carrier providing transportation in Oklahoma as well as other states. Greyhound

sells transportation in Oklahoma for the following types of routes:

a. intrastate routes wholly within the State of Oklahoma.
b. intrastate routes wholly within states other than Oklahoma.
c. interstate routes originating in Oklahoma but terminating in another state.
d. interstate routes originating in Oklahoma and terminating in Oklahoma, but passing through another state.
e. interstate routes wholly outside the state of Oklahoma.

Greyhound Lines, Inc. filed for voluntary relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. In response to this the Appellant, Oklahoma Tax Commission, conducted an audit of Greyhound's books and records, which was completed in November of 1990. The Commission applies a sales tax at a single rate to all tickets for transportation sold in Oklahoma. The audit revealed that Greyhound did not collect state sales taxes from consumers who purchased tickets which involved travel outside the state of Oklahoma.[1]

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[1] The statute at issue here provides in relevant part:

> There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax code, section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following........(emphasis added).

Operating under tax permit no. 458229 Greyhound, however, did remit sales tax on all tickets sold for transportation on an intrastate route wholly within the state of Oklahoma.[2]

Accordingly, the Commission filed claim no. 17841 for $908,212.89 representing the amount allegedly owed by Greyhound for transportation sold that did not involve entirely intrastate routes.[3] Greyhound filed an objection to this claim on April 10, 1992 asserting that the alleged tax liability claimed by the Commission was an improper tax on interstate commerce and therefore violative of the Commerce Clause of the United States Constitution. Following oral argument on the issue, the parties filed stipulations of fact and briefs for consideration by the Bankruptcy Court. United States Bankruptcy Judge Richard S. Schmidt applied the four-prong

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> (c) The transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, airlines, and other means of transportation for hire;

Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

[2] There was no dispute and therefore no claim filed concerning these taxes.

[3] This amount reflects the four and one-half percent tax on gross receipts of all tickets sold by Greyhound in Oklahoma from June 1, 1987 to May 31, 1993, except those taxes previously remitted, and those sales to governmental entities and churches which are deemed exempt by the commission, plus penalties and interest.

test enumerated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, (1977) and concluded that Oklahoma's sales tax, as applied, failed all four prongs, and accordingly sustained Greyhound's objection. It is from this determination that the Appellant appeals.

Therefore the issue on appeal is does Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990), which levies a tax on the gross receipts from sales of transportation for hire, including interstate routes, violate the Commerce Clause of the United States Constitution, and as a consequence did the Bankruptcy court properly sustain Greyhound's objection to claim no. 17841.

CONCLUSIONS OF LAW

This appeal is properly before the Court pursuant to 28 U.S.C. § 158 and Bankruptcy Rule 8002. The issues in this case were presented to the Bankruptcy Court by stipulation and involved only questions of law. Therefore the standard of review in this case is De Novo. Matter of Multiponics, Inc., 662 F.2d 709 (5th Cir. 1980).

In what is commonly referred to as the Commerce Clause, the United States Constitution provides: "Congress shall have the power to regulate commerce, with foreign nations, and among the several states, and with the indian tribes." *U.S. Const. Art. 1§ 8, cl 2.* This grant of power has negative implications on a state's power to tax, and thereby regulates certain transactions involving interstate commerce. In fact, the Commerce Clause has been interpreted to prohibit actions by the states that interfere with interstate commerce. See, Quill Corp. v. North Dakota, 119 L. Ed 91 (1992); South Carolina State Highway Dept. v. Barnwell, 303 U.S. 177, 185 (1983).

Notwithstanding, the Commerce Clause may not be used to exempt persons engaged in interstate commerce from their fair share of state tax. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

State taxes relating to interstate commerce must reflect a balance between paying a just share of taxes and freedom from interference. In Complete Auto Transit, Inc. the Supreme Court pronounced this balance and set forth a four prong test for determining whether or not a state tax violates the Commerce Clause. A state tax will survive constitutional analysis if:

(1) the tax is applied to an activity with a substantial nexus to the taxing state;
(2) the tax is fairly apportioned;
(3) the tax does not discriminate against interstate commerce; and
(4) the tax is fairly related to the services provided by the taxing state.

Further, in order to pass muster the tax must survive all four of the prongs. Id.

Nexus to the Taxing State

The first prong inquires whether the activity subject to the tax has a substantial nexus or relationship to the taxing state. Id.; Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992)(Holding the relationship between the taxing state and the activity must be substantial). Specifically, the activity to be taxed in this case is transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma.

Appellant cites National Geographic Society v. California Bd. of Equalization, for the proposition that the mere sale of the ticket within the state satisfies the requirement of a nexus between the transportation and the state. 430 U.S. 551 (1977). This Court does not agree. National Geographic involved goods purchased by residents of the state of California and received wholly in California, from an organization that maintained offices in California. The court in National Geographic determined that the goods were subject to the sales tax. The case at hand differs significantly.

Greyhound does maintain offices in Oklahoma, however this is where the similarity to National Geographic ends. There is nothing to show that the transportation at issue here is always purchased by a resident of Oklahoma or that it is always received in Oklahoma. The evidence does, however, demonstrate that the tax on gross receipts taxes a portion of transportation paid for in Oklahoma, but not received in Oklahoma. For example, a ticket purchased in Oklahoma for transportation from Tulsa to Dallas, Texas would be subject to the entire tax, even that portion occurring in Texas. There would be no nexus to Oklahoma for the transportation received in Texas. In fact, as applied, the Oklahoma tax could conceivably tax transportation that does not occur in Oklahoma at all. A ticket purchased in Oklahoma for transportation between Austin, Texas and Dallas, Texas would be subject to the sales tax, yet there is no significant nexus between the transportation and the taxing state. The transportation does not even occur in the state.

In order to follow the Appellant's rational the Court is asked to envision that the good purchased is the ticket, rather than the transportation. The Court is unable to close its eyes to the fact that the good purchased is the transportation, as the

ticket is merely a receipt. The Court does not agree that the purchase of a ticket completes the transaction.

Additionally, the Supreme Court has mandated that the mere origination or termination of interstate activity in a particular state is insufficient to establish a substantial nexus to the taxing state. Goldberg v. Sweet, 488 U.S. 252, 263 (1989)(Concerning the termination of interstate communications). As applied, the activity in this case, transportation on all routes except those wholly within the state of Oklahoma, has nothing more than a minimal connection to the taxing state. Therefore the tax fails the first prong of Complete Auto. This analysis alone would be sufficient for the Bankruptcy Court to find that the tax, as applied to Greyhound, was violative of the Commerce Clause. Nevertheless, the Court will consider the remaining factors.

Apportionment

The second prong of the Complete Auto test requires the Court to consider whether the tax is fairly apportioned. In other words, to consider whether the state is taxing only its fair share of an interstate activity, as opposed to taxing the entire interstate activity. Goldberg, 488 U.S. at 260-261.

While the Supreme Court does not mandate a specific apportionment formula, customarily they have determined transportation tax on interstate commerce to be fairly apportioned when it is based on a physical relationship ratio. Interstate activity such as surface transportation over an interstate route is deemed to be fairly apportioned when it is applied only to the activity that is occurring within its borders. See Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1947); Western Live Stock v. Bureau of Revenue, 303

U.S. 250, 257 (1938); Pan American Airways Inc. v. Government of Virgin Islands, 315 F. Supp. 746, affirmed, 459 F.2d 387 (3rd Cir. 1972) (Recognizing that tax on unapportioned gross sales receipts on transportation can burden interstate commerce, but carving an exception for air travel in that it does not have physical contact with the other state as it passes through its airspace).

The Supreme Court in Central Greyhound was faced with an almost identical issue. The New York Tax Commission was attempting to tax gross sales receipts from Greyhound's transportation sales in New York, which included transportation that occurred in the neighboring states. The Court determined that the entire tax need not fail, but that it must be fairly apportioned to coincide with that portion of the mileage that occurred within the state. Notwithstanding, a specific apportionment method has never been mandated by the Supreme Court, and therefore courts must analyze the tax to determine if it is internally and externally consistent. Complete Auto, 488 U.S. at 261.

To be internally consistent the tax must be structured such that if every state imposed an identical statute, no multiple taxation would occur. Id. The statute involved in this case imposes a tax on the gross receipts of each sale of transportation for hire to persons by common carrier, but does not identify a point of sale with respect to transportation.[4] The result is a tax that could encompass transportation sold in

[4] The Appellant does identify a point of sale definition in its tax code, however it does not appear to apply to Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

Oklahoma, but that may not occur in Oklahoma or that may tax transportation sold in other states but that does occur in Oklahoma. In other words, due to the language of the statute, it may allow a tax on the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The activity here, transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma, occurs at least partially in another state. If those states in which the transportation occurred had an identical statute to the one in this case, they would be able to tax the transportation which occurred within their boundaries, thereby causing multiple taxation. For example, assume that one of the tickets sold in Oklahoma was for transportation between Austin and Dallas, and Texas had a statute identical to Oklahoma, one that could conceivably tax both the ticket or the transportation. In that scenario both Texas and Oklahoma could tax the single transaction thereby preventing the tax from being internally consistent. The Supreme Court has noted that only a tax which allows credits for taxes collected by other states on the same transaction can survive this test for constitutionality. Goldberg, 488 U.S. 265.

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. The Claim in this case was for taxes that reflected out of state activities, and therefore the tax is not externally consistent. The Court does not agree with the Appellant that the taxes in this case are self apportioning because the state does not collect taxes on transportation that occurs in Oklahoma, but is ticketed elsewhere. The Statute therefore clearly fails the second prong of the Complete Auto test.

Discrimination Against Interstate Commerce

The third prong of the test requires the taxing authority to show that the tax does not discriminate against interstate commerce. If the discrimination is reflected on the face of the statute, the intent of the statute, or the practical effect of the statute, then the tax discriminates against interstate commerce and is violative of the Commerce Clause. Amerada Hess Corp. v. Director Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). The tax in this case is discriminatory in its practical effect in that it could result in multiple taxation on interstate travelers, while intrastate travelers would not subject to the same burdens. This result is demonstrated infra in this Court's discussion of apportionment.

Relation to State Services

The last prong of the Complete Auto test inquires as to whether or not the tax imposed is related to the presence and activities of the tax payer within the state. The purpose of such an inquiry is to prevent the state's tax burden from hindering those who do not benefit from the services provided by the state. See Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

There is no dispute that the bus passengers/tax payers in this case that travel on intrastate routes in Oklahoma benefit from the services provided by Oklahoma. However, the activities in this case concern actions that occur, at least in part, out of the confines of Oklahoma. The passengers who travel out of the state of Oklahoma, but purchased their tickets in Oklahoma, pay taxes on this transportation, yet for the period that they are not in Oklahoma they do not receive the benefit of Oklahoma's services. Therefore there is no relation

between some the activities attempted to be taxed in this case and the services provided by the State and as a result the tax fails the last prong of Complete Auto.

After a De Novo review of the Bankruptcy Judge's denial of the Appellant's Claim in Bankruptcy No. 90-00985-B-11, it is the Opinion of the Court that because the tax as applied in this case does not satisfy the Supreme Court's test in Complete Auto it was properly denied. The Bankruptcy Court's Order is AFFIRMED.

DONE at Brownsville, Texas this 4th day of October, 1993.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge